

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MEGHANN JEAN GIERSCH
Claimant

VS.

MINNEAPOLIS GOOD SAMARITAN CTR.
Respondent

AND

SENTRY INS. A MUTUAL CO. INC.
Insurance Carrier

Docket No. 1,028,441

ORDER

Claimant requests review of the June 7, 2006 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) found the claimant failed to sustain her burden of proof as to whether the accident arose out of and in the course of employment as well as timely notice. The ALJ further found the claimant failed to establish just cause for enlargement of the notice period to 75 days.

The claimant requests review of whether she suffered an accidental injury arising out of and in the course of employment as well as timely notice. Claimant argues her supervisor witnessed the incident and therefore respondent had notice.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Before the claimant was hired by the respondent, she had right shoulder surgery on October 9, 2002. Dr. Johnson performed a clavicle excision. Claimant testified she continued to have soreness and tenderness after the surgery.

The claimant began working as a certified nurse's aide (CNA) for respondent's nursing home on January 7, 2004. Claimant alleged that on February 14, 2006, as she was helping a co-worker, Carrie Smith, put a resident to bed she reached behind the bed to pick up a wet wipe and as she then pushed herself up off the bed she heard her shoulder pop. Claimant further alleged that the respondent's charge nurse, Brenda Schartz, was also present and standing directly in front of her when the incident occurred.

Carrie Smith also works for the respondent as a CNA. Ms. Smith denied that she ever saw claimant push herself up off a bed as alleged or that she ever heard claimant's shoulder pop. But she did recall claimant told her that she had hurt her shoulder while either cutting or throwing wood.

Brenda Schartz, a licensed practical nurse, has been employed as a supervisor by the respondent for 7-8 years. She denied that she observed claimant pushing herself up from a bed as alleged. But Ms. Schartz did recall an incident on February 14, 2006, when she heard claimant's shoulder pop. She described the incident as occurring in a resident's room while she was talking with claimant who reached out to grip the back of a resident's chair. As claimant reached for the chair her shoulder popped. Ms. Schartz asked claimant what that was and claimant replied her shoulder does that. Claimant neither indicated she was injured nor requested medical treatment.

On February 21, 2006, the claimant told Dana Rice, respondent's administrator, that her shoulder was hurting and that she could not finish bathing the last resident. Ms. Rice asked claimant what had happened to her. Claimant responded that she did not know and that her arm had just been bothering her. Claimant did not mention the alleged February 14, 2006 incident.

Claimant sought treatment with her physician, Dr. Mahalingam Jayareena, on February 22, 2006, and was taken off work until February 26, 2006. The doctor's note of that office visit indicated that claimant was unsure what had happened but thinks when she tried to reach for something her shoulder popped. There is no indication that this alleged reaching incident occurred at work. Claimant took the off work slip to Ms. Rice on February 23, 2006. Then on February 28, 2006, the claimant provided respondent with work restrictions and was placed on family medical leave. Claimant never told Ms. Rice on either occasion that she had been injured on February 14, 2006, at work.

The ALJ determined claimant failed to meet her burden of proof that she suffered accidental injury arising out of her employment and further that she failed to provide timely notice or just cause for extension of the notice time period to 75 days. The ALJ analyzed the evidence in pertinent part:

So we have this - - whether or not this incident actually happened on February 14th, of getting off the bed, it is problematic, but we also have a question of whether, even if it happened, whether that was what resulted in the injury to the shoulder because of what Mrs. Schartz witnessed was claimant just simply reaching her arm out to put it on the back of a Gerry chair.

When Dr. Johnson offers his convenient opinion on May 11th, he specifically refers to the act of pushing off of a bed as a maneuver that would cause a rotator cuff tear or could cause rotator cuff tear. There's nothing about simply raising the arm and extending it causing a rotator cuff tear.

In the final analysis, I don't know whether claimant sustained an injury of any type on February 14 of 2006 because of the disparate descriptions of what happened on that date, and the fact that claimant didn't report an incident on that date to her co-workers or supervisors or to the next three physicians that she saw, and creeping up in the middle of this is a discussion with a co-worker that she actually hurt her shoulder in cutting or throwing wood. So I can't find that the claimant sustained an injury in the manner in which she describes, and even if she did, I can't find either timely notice or good cause for expansion of the notice period.

When claimant expressly represents that her shoulder pops and suggests that it's nothing out of the ordinary, you can't argue that as actual notice of an accident or an injury under the definition of either accident or injury under the Act. And clearly, claimant didn't give any notice until March 9th, which is well outside of the 10 day period, and if claimant is to be given any credence that her problems began on February 14 and continued to progress from that day forward and they're different from what her prior injuries and complaints had been, then there'd be no reason for her to be mislead about whether this was the old injury coming back. And finally, there is a reference in the medical record that when claimant first sought treatment with Dr. Fullen, that her shoulder pain began two weeks prior to March 7th when she simply awoke with the pain and could not move her arm, so for preliminary hearing purposes, I'm going to find that claimant has failed to sustain her burden of proof of personal injury by accident, arising out of and in the course of employment, and further that she has failed to sustain her burden of proof that notice of a claimed accident was provided in a timely manner.¹

The Board agrees and affirms.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bruce E. Moore dated June 7, 2006, is affirmed.

IT IS SO ORDERED.

¹ P.H. Trans. at 106-108.

Dated this 31st day of August 2006.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier